



Digital radio multiplex transmission services in Canberra, Darwin and Hobart

Final Decision Paper

13 March 2019

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1. Introduction

This paper outlines the ACCC's final decision and the matters considered in assessing the digital radio access undertakings for Canberra, Darwin and Hobart.

1.1. The access regime

The ACCC is responsible for implementing and enforcing the digital radio access regime which is a part of the legislative framework introduced by the Australian Government in 2007 through amendments to the *Radiocommunications Act 1992* (the Act), *Broadcasting Services Act 1992* (BSA) and the *Competition and Consumer Act 2010* (CCA).

The access regime allows broadcasters to receive access to digital radio multiplex transmission services on reasonable terms and conditions and ensures licensees do not discriminate anti-competitively between broadcasters. The access undertaking is assessed against the Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2018.

Digital radio services commenced in the metropolitan licence areas (Adelaide, Brisbane, Melbourne, Perth and Sydney) in July 2009 after the ACCC accepted an undertaking from five Joint Venture Companies (JVCs) in April 2009.¹ On 19 December 2013, the ACCC accepted a variation to those undertakings.

Under the BSA, regional licence areas refer to areas other than the metropolitan licence areas. Thus, any references to 'regional' in this document refer to Canberra, Darwin and Hobart.

Pursuant to s. 102C of the Act, the Australian Communications and Media Authority (ACMA) can only issue a foundation category 1 Digital Radio Multiplex Transmitter (DRMT) licence to an eligible JVC. An eligible JVC is formed if, among other things, paragraph 102C(5)(a) of the Act is met, which requires the JVC to invite each incumbent digital commercial radio broadcasting licensee and the digital community radio broadcasting representative company (if one exists) for the designated BSA radio area to subscribe for shares in the company.

The JVCs represent commercial and community digital radio broadcasters and are responsible for multiplexing together the separate streams of content from individual broadcasters and transmitting a combined stream to end users in each licence area. Ideally, a JVC for each digital radio licence area should be made up of both commercial and community digital radio broadcasters.² However, the Community Broadcasters have chosen not to take up any share in the regional JVCs, in line with the previous decision to not take up any shares in any of the metro JVCs.

1.2. The consultation process and submissions

On 31 October 2018, the ACCC received three identical digital radio access undertakings for Canberra, Darwin and Hobart in accordance with s. 118ND of the Act. The new proposed undertakings for the three regional areas are similar to the undertakings that are in place for the metro areas.

¹ Some JVCs in the metro areas have two licenses each, these are the JVCs in Melbourne, Sydney and Brisbane.

² Pursuant to sub-sections 102C (5) (v) and (vi) of the Radiocommunications Act, assuming that the invitation (to hold shares in the JVCs to Community and Commercial broadcasters) were to be accepted by each invitee, the commercial radio broadcasting licensees would hold in aggregate seven-ninths of the shares and community radio broadcasting representative company would hold two-ninths of the shares.

The ACCC released a consultation and position paper on 19 November 2018. The ACCC's preliminary position was to accept the undertakings subject to assessment of submissions received from the stakeholders. Seven submissions were received in response to the consultation and position paper. The Community Broadcasting Association of Australia (CBAA)³ provided a substantive submission expressing some concerns, while the other six submissions from the commercial digital radio broadcasters, including Commercial Radio Australia (CRA)⁴, were nearly identical to each other and in support of the undertaking.

The CBAA raised three main concerns in its submission, these concerns related to:

- A formal consultation mechanism, including for discussion of interoperability and other technical matters.
- Capacity allocation and the efficient use of transmission power.
- Further transparency and process surrounding the allocation of excess capacity following the first 12 months of the undertaking.

Chapter 4 of this paper discusses this further.

The ACCC undertook further consultation and invited the stakeholders to provide further submissions to clarify the matters raised by the CBAA's initial submission. On 15 February 2019, CBAA provided a subsequent submission and on 20 February 2019, the JVCs provided a submission which addressed the issues raised by the CBAA in both the initial and subsequent submissions. All submissions are available at the ACCC website.⁵

1.3. Next steps for digital radio commencement

The ACCC has no statutory time frame within which it must reach a decision on the undertaking. Once an undertaking is accepted, it remains in force for the length of the licence term but can be reviewed by the ACCC subject to certain parameters.

The JVCs initially anticipated a start-up date of 1 March 2019. Consequently, CRA sought to extend the digital radio trial licences for Canberra and Darwin to 31 March 2019.⁶ At the time, the JVCs had expected to apply for the foundation category 1 digital radio multiplex transmitter licences by the end May 2018 and submit the access undertakings to the ACCC soon afterwards. However, applications for the foundation licences were submitted to the ACMA in August and September 2018.

More recently, the JVCs in Canberra and Darwin have commenced replacing the transmission equipment used during the digital radio trials and installing more permanent, high-powered transmission equipment. In January 2019 the ACMA approved an increase to the maximum power allowed for digital radio transmissions in Canberra, as requested by the licensees. The new transmitter for Canberra will not be available until June 2019. As a result, CRA has requested an extension to the Canberra digital radio trial licence until 31 July 2019. Canberra is aiming for a digital radio start-up day of 1 July 2019. The ACMA is also extending the Darwin digital radio trial to 31 July 2019. Both trial licences expire on 31 March 2019 and the ACMA wants to ensure there is enough time between the ACCC making a

³ The CBAA is the peak body for community broadcasting in Australia, representing over 350+ licensed community broadcasters. It acts under agency arrangements as a single point of coordination for community broadcasting licensees designated to be digital radio access seekers under the Act.

⁴ All six submissions from the commercial digital radio broadcasters is referred to as submission from CRA in this paper as the six submissions are nearly identical.

⁵ ACCC, *Digital radio services – Undertakings for Canberra, Darwin and Hobart*, December 2018, www.accc.gov.au/regulated-infrastructure/communications/broadcasting-content/digital-radio-services/undertakings-canberra-darwin-hobart

⁶ Digital radio trial transmissions commenced in Canberra and Darwin in 2010 and are run by Commercial Radio Australia

decision on the access undertakings and the ACMA setting the start-up day for transmissions under the foundation licences.

Darwin is due to commence testing the new transmission equipment in mid-March 2019. Hobart has recently completed testing of its transmitter equipment. It is anticipated that Darwin and Hobart will be ready to commence digital radio transmissions under their 15-year foundation licences once the ACCC approves the access undertakings and the ACMA sets the start-up day. The digital radio start-up day can only be declared by ACMA once the ACCC accepts the access undertakings after the period of consultation.⁷

Pursuant to s. 118NF of the Act, the ACCC must accept or reject the undertaking in the first instance after public consultation. If the ACCC accepts the undertaking, the undertaking comes into force at the time of acceptance and remains in force while the licence is in force. If the ACCC decides to reject the undertaking, it can ask the JVCs to vary the undertaking after it gives them a rejection notice explaining if certain alterations are made and submitted within a specified period of time, the ACCC will accept it. A further consultation is not needed in such case. The ACCC may also decide to reject the undertaking and then alter the terms and conditions and then determine that to be the undertaking in force. A public consultation is required if this is the chosen decision. Chapter 2 explains the legislative framework in more detail.

2. Legislative framework

2.1. Digital radio legislative framework

The legislative framework for the provision of digital radio services was introduced by the Australian Government in 2007 through the *Broadcasting Legislation Amendment (Digital Radio) Act 2007*. This Act amended the *Radiocommunications Act 1992* (the Act), the BSA and the CCA (then known as the *Trade Practices Act 1974*).

Digital radio services are intended to operate alongside, rather than replace, existing analog (AM and FM) radio services. There are currently no plans to switch off analog radio services, nor is there any requirement to simulcast both analog and digital radio services.

Digital radio was designed to be introduced in stages, commencing first in metropolitan areas, where new services were considered most likely to be commercially viable, before being rolled out to regional licence areas. This set of undertakings marks the first undertakings of the regional licence areas. The technology currently being used to provide digital radio services in Australia is an advanced form of Digital Audio Broadcasting (DAB) technology known as DAB+.

The Act does not specify the basis the ACCC is required to make its decision to accept or reject an undertaking, but it does enable the ACCC to determine relevant decision-making criteria.⁸ The ACCC made the decision-making criteria, as well as procedural rules in relation to the assessment process, on 27 May 2008.⁹ These were repealed and remade on 23 May 2018¹⁰ to promote transparency in decision-making. This was done by setting out the criteria the ACCC must apply in deciding whether to accept an access undertaking or a variation of an access undertaking in relation to a digital radio multiplex transmitter licence.

⁷ Section 8AC(1)(d) of the *Broadcasting Services Act 1992*.

⁸ Section 118NJ of the Act.

⁹ ACCC, *Digital radio services – Decision making criteria and procedural rules*, 27 May 2008, www.accc.gov.au/regulated-infrastructure/communications/broadcasting-content/digital-radio-services/decision-making-criteria-and-procedural-rules

¹⁰ ACCC, *Digital radio services – New instruments*, 23 May 2018, www.accc.gov.au/regulated-infrastructure/communications/broadcasting-content/digital-radio-services/new-instruments

Division 4B of Part 3.3 of the Act sets out an access regime for the multiplex transmitter licences. The access regime, which is administered by the ACCC is designed to ensure that eligible broadcasters have access to the multiplex transmission service on reasonable terms and conditions.

The access regime is discussed in further detail below.

General requirements

The Act sets out a range of requirements and procedures, including:

- A DRMT Licensee must, within 50 days after the issue of the licence, give the ACCC a written access undertaking (s. 118ND).
- The ACCC may request the DRMT Licensee to provide further information about the access undertaking once the initial access undertaking is lodged with the ACCC, which must be provided within 14 days from the date of the request (s. 118NE and the Procedural Rules).
- The undertaking comes into force at the time it is accepted by the ACCC and remains in force while the licence is in force and the undertaking also remains in force if the licence is renewed (s. 118NG).
- The ACCC must maintain a register of the undertakings (s. 118NK).
- DRMT Licensees must, within 60 days after the end of the financial year, provide an annual report to the ACCC in relation to matters specified in the procedural rules and in compliance with the relevant access obligations (s. 118PN).
- Enforcement arrangements, including that the ACCC or a person affected may apply to the Federal Court for orders (ss. 118P and 118NZ). The ACCC can also apply for injunctions or interim injunctions (ss. 118PI and 118PJ).
- A person whose interests are affected by specified decisions by the ACCC relating to these undertakings may apply within 21 days to the Australian Competition Tribunal (ACT) for a review of that decision (s. 118PE).

ACCC procedural rules and decision-making criteria

Procedural Rules

Section 118PO of the Act provides for the ACCC to make rules in relation to the practice and procedure to be followed by the ACCC in performing functions under Division 4B of Part 3.3 of the Act. The ACCC made these Procedural Rules on 23 May 2018. The rules provide details regarding matters such as the format of documents to be given to the ACCC, the ACCC's requests for further information, the treatment of confidentiality claims over information, and matters to be included in annual reports provided under s. 118PN of the Act.

Decision-making criteria

Section 118NJ of the Act provides that the ACCC may by legislative instrument, determine the criteria to be applied by the ACCC in deciding whether to accept access undertakings. The ACCC made decision-making criteria on 23 May 2018. The ACCC must apply the criteria and have regard to other relevant matters when deciding to accept an access undertaking or a variation of an access undertaking. These are set out in more detail in Part 4.2 below.

ACCC to accept or reject access undertakings

In accordance with s. 118NF of the Act, once a DRMT Licensee submits an access undertaking to the ACCC, the ACCC must either accept or reject the undertaking. Before accepting, the ACCC must publish a copy of the access undertaking on the ACCC's website and invite members of the public to make submissions to the ACCC within a specified period. The ACCC must consider any submissions received within this period.

If the ACCC accepts the access undertaking, the ACCC must give the DRMT Licensee a written notice stating that the access undertaking has been accepted. Section 8AC of the BSA states that the ACCC must accept the access undertaking before the ACMA can declare a digital radio start-up day for the licence area.

If the ACCC rejects the access undertaking, it must give the DRMT Licensee a written notice setting out the reasons for the rejection.

Further, the ACCC may give the DRMT Licensee a written notice advising them that if certain alterations are made and submitted within a specified period of time, as outlined in the Procedural Rules, the ACCC will accept the altered access undertaking.

Alternatively, the ACCC may specify certain terms and conditions of access and issue a written notice to the DRMT Licensee specifying the terms and conditions of access. Before issuing the notice, the ACCC must publish a copy of the notice on the ACCC's website and invite members of the public to make submissions within a specified time period to the ACCC regarding the alterations. The ACCC must again consider any submissions it receives.

Access obligations

Section 118NL of the Act sets out the standard access obligations. Section 118NM sets out the excess-capacity access obligations. Both sections outline that DRMT Licensees must provide access to specified fractions of multiplex capacity that satisfy both standard access entitlements or excess-capacity access entitlements, to particular content service providers. DRMT Licensees must also provide access to services that facilitate the use of that fraction of multiplex capacity for the purpose of providing content services.

DRMT Licensees must not discriminate between access seekers on the basis of:

- the technical and operational quality of the services supplied to the access seekers; and
- the technical and operational quality and timing of the fault detection, handling and rectification supplied to the access seekers.¹¹

Standard access entitlements and excess-capacity entitlements

Content service providers can have standard access entitlements and excess-capacity access entitlements.

Sections 118NQ and 118NR of the Act sets out standard access entitlements for incumbent commercial and community broadcasters. Each incumbent commercial broadcaster has a standard access entitlement equal to one-ninth of the total transmission capacity under the licence. Community broadcasters share a total of two-ninths of total transmission capacity under the licence.

¹¹ Section 118NP, *Radiocommunications Act 1992*

Standard access entitlements for both commercial broadcasters and community broadcasters cannot be transferred to other broadcasters.¹² However, different community broadcasters can be nominated by the community broadcaster representative company to use these access entitlements.

Excess-capacity access entitlements are set out in s. 118NT of the Act.

Capacity cap

Section 118NV of the Act sets out the capacity cap for commercial broadcasters. In these regional licence areas where there is only one category 1 multiplex, a commercial broadcaster is not entitled to more than two-ninths of the total transmission capacity available under the licence.

2.2. Criteria for assessing undertakings

In addition to the provisions in section 2.1, the legislative framework also enables the ACCC to determine the criteria on which it will assess whether to accept or reject an access undertaking. The criteria are described below.

Whether the access undertaking complies with Division 4B Part 3.3 of the Act

Under s. 118ND, a DRMT Licensee must provide an access undertaking to the ACCC within 50 days after the issue of a licence.

In assessing whether to accept an access undertaking the ACCC must consider whether the terms and conditions of access in the access undertaking comply with the access framework set out in Division 4B of Part 3.3 of the Act. The terms and conditions in an access undertaking must include terms and conditions that relate to standard access obligations and excess capacity obligations that are or may become applicable to a DRMT Licensee. The DRMT Licensee will be under an obligation to comply with those access obligations that are applicable to the licence on such terms and conditions as are ascertained in accordance with the accepted access undertaking (s. 118NO).

DRMT Licensees also have an obligation under the Act to not discriminate between content service providers who have access to multiplex capacity under the licence. Licensees must not discriminate in the technical and operational quality of the services supplied, and the technical and operational quality and timing of fault detection, handling and rectification processes (s. 118NP).

Whether the access undertaking unduly restricts competition in related markets

An access undertaking should not frustrate or unreasonably restrict the ability of an access seeker (a person with either a standard access entitlement and/or an excess capacity access entitlement) to provide services, including in competition with any services provided by other parties. Similarly, an access undertaking should not favour particular access seekers. For example, access seekers that are not constituent members of a DRMT Licensee should not be charged unreasonably high prices or provided with unreasonably low quality services or be unreasonably disadvantaged in any other way relative to access seekers that are constituent members of a DRMT Licensee.

Under this criterion, a DRMT Licensee would, for example, be prevented from including provisions in its access undertaking that artificially inflated some access seekers' costs or

¹² Sections 118NQ(2)(e) and 118NR(3)(e), *Radiocommunications Act 1992*

enabled a DRMT Licensee to provide inferior services to some access seekers compared to others in a manner that was unreasonable. It may be appropriate for the ACCC to consider whether the undertaking provides for the efficient use of the radiocommunications spectrum allocated for the purposes of the service.

In applying this criterion, the ACCC recognises that DRMT Licensees have a right to conduct their businesses to normal commercial standards, free from any undue or unfair interference caused by the rights of access seekers to access the multiplex capacity and associated services specified in the access undertaking.

Whether the terms and conditions of access specified in the access undertaking are reasonable

The ACCC notes the objective in the Explanatory Memorandum to the *Broadcasting Legislation Amendment (Digital Radio) Bill 2007* that multiplex services (including bit rate) are provided to commercial, wide coverage community and data service operators on terms and conditions that are efficient, open and transparent, and generally non-discriminatory.

In the context of this objective, the ACCC considers that the terms and conditions of access in an access undertaking should be reasonable. The ACCC considers that the attributes characterising 'reasonable' terms and conditions include certainty, fairness and balance, timeliness and the removal of any potential for delaying access. Without limiting the range of issues that may be taken into account, the following examples are the kind of things which the ACCC may take into account in assessing the reasonableness of the terms and conditions contained in an access undertaking:

- the legitimate business interests of the DRMT Licensee and its investment in facilities used to supply the service
- the interests of persons who have rights to use the service
- the standard of transmission facilities or services offered, including the compatibility or inter-operability of the equipment and facilities of the access providers (i.e. licensees) with those of potential access seekers
- the public interest in having competition in markets and efficient investment in facilities and services
- the operational and technical requirements necessary for the safe and reliable operation of the service
- the economically efficient operation of the network.

This criterion will not be applied unreasonably, as the ACCC accepts that DRMT Licensees may impose reasonable requirements on access seekers in certain circumstances.

Whether the access prices or pricing methodologies are fair and reasonable

All prices or pricing methodologies in the access undertaking must be fair and reasonable.

Fair and reasonable access prices included in an access undertaking should reflect the efficient costs of providing access to the multiplex capacity and associated services including a normal commercial rate of return. Reasonable access prices are required to ensure that the pricing of access to multiplex capacity is not excessive, and to ensure that access seekers are not disadvantaged for reasons which are anticompetitive.

If the actual access costs are known, it may be possible to specify prices in the access undertaking. However, if the DRMT Licensee does not know the actual access costs at the time of lodging an undertaking, it may instead provide a fair and reasonable pricing

methodology. This might be the case, for example, if agreement with infrastructure owners/operators has not yet been concluded.

If including a fair and reasonable pricing methodology, the ACCC would prefer that the access undertaking is supported by the DRMT Licensee's estimates of indicative prices, based on reasonable assumptions.

Whether there is an obligation on the DRMT Licensee to not hinder access

An obligation to not hinder access should be included in the access undertaking. The rationale for this obligation is that it is possible that a DRMT Licensee or a person authorised by a DRMT Licensee could do an act (or fail to do an act) that has the effect of hindering access to services.

For example, a DRMT Licensee or a person authorised by a DRMT Licensee may adopt certain technology or standards that have the effect of hindering access to some access seekers under the terms of the access undertaking. A licensee should offer an appropriate standard of transmission facilities or service for access seekers.

However, an obligation to not hinder access would not be applied unreasonably. As an example, DRMT Licensees may require access seekers to be creditworthy or may require access seekers to demonstrate the technical capabilities to provide their content stream in an appropriate format for multiplexing and broadcasting.

Whether the undertaking provides for a reasonable dispute resolution mechanism

In considering the dispute resolution mechanism (DRM) included in the undertaking, the ACCC will assess whether the provisions facilitate the fair, timely and efficient resolution of disputes, including through the appointment of an appropriate arbitrator within a reasonable timeframe.

In assessing the reasonableness of the DRM, the ACCC may consider, among other things, whether the DRM:

- sets out the appropriate triggers and timeframes for dispute resolution, including the process for dispute notification and dispute termination
- describes the process that will govern any dispute, including the definition and ambit of matters that may be resolved pursuant to the DRM and details of any differences between price and non-price processes
- identifies an appropriate arbitrator, or outlines a process for the selection of an appropriate arbitrator, taking into account the arbitrator's independence and impartiality, appropriate credentials and industry-specific knowledge and skills
- identifies (without limiting) the factors to which the arbitrator should have regard in considering a dispute, which should include the terms and conditions of the access undertaking
- defines the duties, functions, liability, authority and jurisdiction of the arbitrator
- defines the enforceability of any dispute resolution mechanism on the parties, including the enforceability of an arbitrated settlement.

This criterion ensures that the objectives of the other decision-making criteria may actually be enforced.

Other matters which the ACCC may consider

The criteria described above do not, by implication, limit the matters to which the ACCC may have regard in deciding whether to accept an access undertaking.

3. Summary of the undertakings

3.1. Access undertaking

The access undertaking comprises of a main part and two attachments:

- attachment A: service description; and
- attachment B: access agreement – a substantial part of the undertaking.

In the main part of the undertaking, the DRMT Licensee states that it undertakes to:

- be bound by the obligations set out in Part 3.3, Division 4B of the Act
- supply the multiplex transmission service in accordance with the Act, including but not limited to the obligation of non-discrimination between content service providers in s. 118NP of the Act in relation to:
 - the technical and operational quality of the services supplied to the content service providers
 - the technical and operational quality and timing of the fault detection, handling and rectification supplied to the content service providers
- provide the multiplex transmission service to access seekers on the terms and conditions specified in the access agreement, which forms part of the access undertaking, to enable broadcasters to obtain the capacity to which they are entitled
- if needed, amend, replace or vary the access undertaking in accordance with the Act and that this process is not limited by the undertakings made. It also states that any replacement or variation of the undertakings will automatically form part of an Access Agreement that has been entered into between those parties.

3.2. Service description (Attachment A)

This part of the undertaking provides a description of the multiplex transmission service. This is described as a service provided by the DRMT Licensee to access seekers who have access to multiplex capacity, for the transmission over that multiplex capacity of digital channels supplied by access seekers to the multiplex licence. It includes a technical explanation of each of the components of the multiplex transmission service. The service description is nearly identical to the service description in the 2013 varied undertaking, with some redundant words removed.

3.3. Access agreement (Attachment B)

The Access Agreement provides the bulk of the details of the undertaking, including many of the specifics that underpin the statements in the access undertaking. The matters covered by the Access Agreement include:

- a statement that the DRMT Licensee will develop a binding operational manual, in consultation with the access seekers, to deal with technical and operational matters in relation to the multiplex transmission service

- provisions setting out the manner in which the DRMT Licensee will allocate both standard access entitlements and excess-capacity entitlements, as prescribed in Part 3.3, Division 4B, Subdivision C of the Act
- provisions regarding the supply of the multiplex transmission service, such as the DRMT Licensee not being able to prevent an access seeker from obtaining access to the service in accordance with the access agreement or the obligation on the DRMT Licensee to not discriminate between access seekers
- a methodology for determining the charges payable by the access seekers for using the service to allow the DRMT Licensee to recover its efficient costs and to earn a normal commercial rate of return on its investment
- dispute resolution procedures arising under or in connection with the Access Agreement
- other provisions relating to representation and warranties, access and maintenance, invoices and payment (including reviews into the creditworthiness of the access seeker and financial security), suspension and termination of the service, liability and indemnity, intellectual property, confidentiality and external audits
- provisions in relation to varying the access agreement, where variations are to be made in writing, signed by each party and approved by the ACCC. Pursuant to clause 4.2 in the main body of the access undertaking, any replacement or variation of the undertaking will, unless otherwise agreed between the parties, automatically form part of the access agreement.

4. The ACCC's assessment of the submissions received

As mentioned in section 1.2, the ACCC initially received seven submissions in response to the consultation paper.¹³ Six of these submissions were from commercial radio broadcasters and one was from the CBAA.¹⁴ The CBAA's submission had a view that the undertaking should be accepted subject to improvements which are intended to improve service diversity and promote access.¹⁵ For clarification and further comment on issues raised by the CBAA, subsequent submissions were received from the CBAA and the JVCs on 15 February 2019 and 20 February 2019, respectively.

The sections below outlines the ACCC's assessment in light of the submissions received to reflect whether the undertaking meets the requirements in the Decision-Making Criteria.¹⁶

4.1. Compliance with Division 4B of Part 3.3

The ACCC's preliminary position was that the proposed undertakings comply with Division 4B of Part 3.3 of the Act.¹⁷ This was based on consideration of facts such as:

¹³ ACCC, *Digital radio multiple transmission services in Canberra, Darwin and Hobart – Consultation and position paper*, 19 November 2018, 19 November 2018, [ACCC's consultation and position paper](#)

¹⁴ The six commercial radio broadcasters who submitted to the consultation and position paper are: Canberra FM Radio Pty Ltd; Commercial Broadcasters Proprietary Limited; Commercial Radio Australia; Great Southern Land Broadcasters Pty Ltd; Northern Territory Broadcasters Pty Ltd; Radio Canberra Pty Ltd. Because these submissions are very similar to each other, this paper refers to them as one submission - CRA's submission.

¹⁵ CBAA, *Submission for assessment of access undertaking for digital radio multiplex transmission services in Canberra, Darwin and Hobart*, 20 December 2018, [CBAA submission to the ACCC's consultation and position paper](#)

¹⁶ [Digital Radio Multiplex Transmitter Licences \(Decision-Making Criteria\) Determination 2018](#)

¹⁷ A simplified outline of Division 4B of Part 3.3 of the Act as set out in s. 118N of the Act are:

- This Division sets out an access regime for digital radio multiplex transmitter licences.
- A digital radio multiplex transmitter licensee is required to comply with access obligations in relation to multiplex capacity under the licence.
- The access obligations facilitate the provision of access to multiplex capacity by content service providers in order that the content service providers can provide content services.

- each of the JVCs provided the access undertaking to the ACCC within 50 days after the issue of the DRMT Licences in compliance with s. 118ND of the Act
- clause 4.2 of the proposed access agreement complies with s. 118NO of the Act by stating that the DRMT Licensee must provide each Digital Broadcaster with access to Multiplex Capacity to which it is entitled as a Standard Access Entitlement¹⁸
- clause 4.3 of the proposed access agreement complies with Division 4B of Part 3.3 of the Act by providing that incumbent commercial broadcasters will be allocated a standard access entitlement in accordance with s. 118NQ of the Act
- clause 4.4 of the proposed access agreement complies with Division 4B of Part 3.3 of the Act by providing that nominated digital community broadcasters will be allocated a standard access entitlement, and that two-ninths of the multiplex capacity are reserved for nominated digital community broadcasters in accordance with s. 118NR of the Act
- clause 5.2 of the proposed access agreement complies with s. 118NO of the Act by stating that the DRMT Licensees must provide each incumbent commercial broadcaster and digital community broadcaster with access to the fraction of multiplex capacity to which it may be entitled as an Excess-Capacity Access Entitlement
- clause 7.3 of the proposed access agreement and clause 3.1(b) of the proposed access undertaking complies with s. 118NP of the Act by providing that the DRMT Licensee must not discriminate between access seekers to which it provides the multiplex transmission service for the purposes of facilitating the use of the service in relation to:
 - the technical and operational quality of the multiplex transmission service supplied to access seekers
 - the technical and operational quality and timing of the fault detection, handling and rectification supplied to access seekers
- the terms and conditions in the proposed access agreement in relation to complying with Division 4B of Part 3.3 of the Act are similar to those accepted by the ACCC in the 2013 varied access undertaking
- the CBAA submitted previously that the access regime appears to be working effectively and efficiently in facilitating access to the DRMT service¹⁹
- the measures in the Procedural Rules promote transparency surrounding the operation of the regime and facilitates the disclosure of key information about the access arrangements, including non-compliance. The same obligation applies to the existing undertakings and has shown to be an effective compliance measure²⁰

All submissions to the consultation and position paper agreed with the ACCC's preliminary position that the proposed undertakings comply with Division 4B of Part 3.3 of the Act. As a result, the ACCC's position is unchanged from the consultation and position paper, that is, the undertaking complies with Division 4B of Part 3.3 of the Act.

4.2. Whether the undertaking unduly restricts competition

The ACCC's preliminary position was that the proposed undertaking does not unduly restrict competition in related markets. This was based on facts such as:

• The terms and conditions on which a digital radio multiplex transmitter licensee is required to comply with the access obligations are as set out in an access undertaking in force in relation to the licence.

¹⁸ Digital Broadcaster is defined in Schedule 1 of the proposed access agreement as: (a) an Incumbent Commercial Broadcaster; or (b) a Digital Community Broadcaster.

¹⁹ CBAA, *Submission to review of digital radio instruments*, April 2018, [Review of digital radio instruments](#)

²⁰ [Digital Radio Multiplex Transmitter Licences Procedural Rules 2018](#)

- clause 7.2 of the proposed access agreement provides that the DRMT Licensee must not prevent an access seeker from obtaining access to multiplex transmission service in accordance with the applicable terms of the access agreement
- clause 7.3(b) of the proposed access agreement provides that the DRMT Licensee must not discriminate between access seekers in relation to technical and operational quality of the service supplied or in relation to fault detection, handling and rectification supplied on the basis that the access seeker is or is not a shareholder of the DRMT Licensee
- the terms and conditions in the proposed undertaking in relation to restricting competition in related markets are similar to those accepted by the ACCC in the 2013 varied access undertaking

CRA submitted that there is no aspect of the undertaking that unreasonably restricts competition for digital radio services or related markets. CRA stated that the undertaking includes a transparent and non-discriminatory process for allocating access entitlements, which reflect the requirements of the Act. Furthermore, CRA submitted that the undertaking will likely promote competition in downstream markets and have a negligible impact on upstream markets.

The CBAA raised two concerns in relation to:

- efficient usage of transmission power
- excess capacity allocation.

Sections 4.2.1 and 4.2.2 provide more details in relation to these concerns.

4.2.1. Efficient usage of transmission power

Stakeholder views and concerns

The CBAA submitted that the undertaking can be improved with the addition of a commitment to the efficient use of spectrum by operation of radiofrequency service as near as practical to the maximum specified in the relevant ACMA licence. The CBAA also submitted that it has recommended to the ACMA that future digital radio multiplex transmitter (DRMT) licences prepared by the ACMA include a condition that requires the minimum peak effective radiated power (ERP) align as closely as is practical to the specification for maximum peak ERP as published in the relevant digital radio channel plan (DRCP).

The CBAA also indicated that it made a submission²¹ to the ACMA recently in relation to the tolerance limit for ERPs in the licence conditions for Canberra where it suggested that the maximum ERP should be 20 kW while the minimum ERP should be 2 dB below the maximum ERP.²²

In further consultation with the ACCC, the CBAA explained that it considers the DRMT licensees may have an incentive to run the transmitters at a lower power, as this could result in significant cost saving for the DRMT licensees. The implication or effect of such a decision would be a weaker/lower quality signal and a higher error rate if the party has less capacity to adjust its error rate.

²¹ The CBAA submission can be found at www.acma.gov.au/theACMA/proposal-to-increase-digital-radio-power-in-canberra, under 'Other submissions received' on the right hand side. The ACMA advised that The CBAA submission was in response to a proposal to increase the maximum digital radio power for Canberra, as specified in the [Radiocommunications \(Digital Radio Channels – NSW/ACT\) Plan 2007](#). The minimum coverage criterion issue raised by the CBAA in its submission is specified in section 11 of the [Broadcasting Services \(Technical Planning\) Guidelines 2017](#), which wasn't the subject of the consultation. While the ACMA has noted the issue raised by CBAA, there has been no deliberation or action taken on it.

²² CBAA, *Submission to proposed changes to the digital radio channel plan*, December 2018, p. 2, [CBAA submission to proposed changes to the digital radio channel plan](#)

The CBAA raised this as an issue for the community broadcasters because including more error correction would mean that the data rate available for content for the community broadcasters would be lessened.

In contrast, the commercial broadcasters within their higher allocated capacity can accommodate this by including a little more error correction capability in the transmitted signal.

The ACCC considered the CBAA's concerns and asked the JVCs to explain the matters raised by the CBAA. The JVCs submitted that:

- the digital radio channel plan (DRCP) for each digital radio broadcasting area prescribes the location for the main transmission infrastructure and the technical specifications to be used in each market, including the maximum effective radiated power (ERP).
- the maximum ERP in the Canberra market was recently increased four times from 5 kW to 20 kW.²³ In response, the Canberra JVC has ordered more transmission equipment to ensure that it can deliver the multiplex transmission service at the increased full power. The maximum ERP for each market is summarised in Table 1.

Table 1 Maximum effective radiated power for regional digital radio markets

Digital radio market	Maximum ERP
Canberra	20 kW (formerly 5 kW)
Darwin	20 kW
Hobart	20 kW

- in addition to the maximum ERP level for each market, the JVCs are also required, as a licence condition, to ensure transmission power does not fall below 5 dB of the maximum ERP.
- as the owners of the JVCs will also be the primary users of the multiplex transmission service, the JVCs have strong incentives to invest prudently and to operate the digital radio transmission facilities at:
 - maximum power (or as close as possible to the maximum ERP); and
 - the highest practicable quality and standard.

ACCC assessment:

Section 44A(1)(e) of the Act requires the ACMA to prepare a DRCP which determines technical specifications of multiplex transmitters operated under DRMT licences for the designated BSA area.²⁴ Section 44A(11) also requires the ACMA to ensure that a DRCP does not discriminate between the DRMT licensees in relation to the technical specifications of multiplex transmitters.

Section 130AB of the *Broadcasting Services Act 1992* provides that the ACMA may, by legislative instrument, determine technical standards that relate to the operation of multiplex transmitters under digital radio multiplex transmitter licences.

The Digital Radio Planning Committee (DRPC) for regional Australia, which was established in September 2015 and chaired by the ACMA and comprised of representatives from the

²³ [Radiocommunications \(Digital Radio Channels – NSW/ACT\) Plan Variation 2019 \(No. 1\)](#)

²⁴ The Act defines designated BSA radio area as: (a) the BSA licence area of a commercial radio broadcasting licence; or (b) the BSA licence area of a community radio broadcasting licence, where that BSA licence area is the same as the BSA licence area of a commercial radio broadcasting licence.

commercial radio broadcasting industry, the national broadcasters, the community broadcasting industry, Department of Communications and the Arts and the ACCC has been working collaboratively towards an economically feasible rollout of digital radio to regional Australia. A technical sub-committee (TSC), chaired by CRA was created by the DRPC to develop draft recommendations on the high-level planning principles.²⁵ The planning principles adopted by the ACMA are available on the ACMA website.²⁶

One of the planning principles is to set a power limitation for all regional licence areas to 5 kW nominal effective radiated power (ERP). The principles stated that higher power will be considered on a case-by-case basis if there is minimal additional interference to other areas.

Pursuant to s. 11 of the Broadcasting Services (Technical Planning) Guidelines 2017, the minimum ERP is 5 dB below the maximum ERP specified in the DRCP.²⁷

The ACCC considers that the CBAA's requests for changes to the technical conditions (for example, a -2 dB lower bound rather than -5 dB) could be brought up through the technical forums with the ACMA. For reference on the transmission power:

- a 5 dB reduction in maximum ERP (20 kW) yields a lower bound of 6.3 kW (a 68 per cent reduction in transmission power).
- a 2 dB reduction in maximum ERP suggested by CBAA would result in a lower bound of 12.6 kW (a 37 per cent reduction in transmission power).

These minimums are higher than the previous proposed Canberra maximum of 5 kW.

The ACCC consulted with the ACMA on this matter and the ACMA has confirmed that it has decided to increase the maximum amount of ERP in Canberra from 5 kW to 20 kW.²⁸ According to the ACMA, this increase in power will be sufficient to remedy CBAA's concerns in Canberra. The maximum amount of ERP for Darwin and Hobart are set to 20 kW pursuant to the DRMT licences.

The ACCC considers that the ACMA's decision to increase the maximum ERP in Canberra is sufficient to resolve CBAA's concern in relation to this matter. Accordingly, the undertaking does not allow the access provider to unduly restrict competition. Therefore, the ACCC does not consider any changes to the proposed undertaking are required in relation to this matter.

4.2.2. Excess capacity allocation after 12 months from start-up

Stakeholder views and concerns

The CBAA submitted that "the undertakings can be improved with the addition of a commitment to... undertake a process that leads to allocation of excess capacity by grant or auction" by the DRMT Licensees.²⁹

The CBAA is concerned that s. 118NT(3) of the Act does not make it mandatory for the JVCs to determine the level of demand for residual excess capacity after the initial 12 month period from the start-up date. Unlike s. 118NT(2) of the Act which provides that the DRMT

²⁵ACMA, *Digital radio - planning principles and ACMA roadmap for digital radio expansion*, December 2016, www.acma.gov.au/Industry/Broadcast/Spectrum-for-broadcasting/Broadcast-planning/digital-radio-spectrum-for-broadcasters-acma-1

²⁶ www.acma.gov.au/Industry/Broadcast/Spectrum-for-broadcasting/Spectrum-digital-radio/planning-principles

²⁷ On 26 September 2017, the ACMA made this guideline under s. 33 of the Broadcasting Services Act 1992.

²⁸ ACMA decision on increasing the maximum power for Canberra is available at www.acma.gov.au/theACMA/proposal-to-increase-digital-radio-power-in-canberra under 'Outcome'.

²⁹ CBAA, *Submission for assessment of access undertaking for digital radio multiplex transmission services in Canberra, Darwin and Hobart*, December 2018, p. 13

licensees “must” ascertain demand for excess capacity within 90 days after the digital radio start-up day, s. 118NT(3) provides that the DRMT licensees “may” ascertain demand for the residual excess capacity after the 12-month period.

Clause 5.3(a) of the proposed access agreement provides that the DRMT licensees will allocate Excess-Capacity Access Entitlement to each Digital Broadcaster in accordance with s. 118NT of the Act.

The CBAA’s concern is that s. 118NT(3) of the Act does not provide a mandatory requirement for the DRMT Licensee to undergo this formal process to ascertain the level of demand for Excess Capacity after the initial 12 months. Also, the CBAA raised concern that this section of the Act does not appear to prevent the DRMT Licensee potentially granting an excess-capacity entitlement to a party seeking access nor does it prohibit such a grant of access. The CBAA submitted that a structured and transparent process should be in place and suggested that the access undertaking should be updated to clarify the circumstance under which the DRMT Licensee would ascertain the level of demand for unused Excess Capacity.

The CBAA proposed an amendment to make clear the circumstance the DRMT Licensee would ascertain the level of demand for unused excess capacity. Further, the CBAA submits that that proposal would address the “shortcomings” in the access undertaking as it would provide a process by which an access seeker could seek excess capacity and then trigger the process to ascertain demand for that capacity and, if there is sufficient demand, to trigger an auction process.³⁰

The ACCC has raised these matters in further consultation with both the CBAA and the JVCs. The JVCs expressed strong disagreement with including provisions within the access undertaking that are inconsistent with the overarching legislative framework.

The JVCs wrote that s. 118NT of the Act governs the applicable process for allocating excess capacity and provides:

- a mandatory process for initially ascertaining demand for any excess capacity within 90 days of the digital radio start up day; and
- an optional process for ascertaining demand for any excess capacity if any exists at any time after the 12-month period starting on the digital radio start up day (residual excess capacity)
- in both the above cases:
 - if demand falls short of the available excess multiplex capacity, then each access seeker is entitled to the fraction sought
 - if demand exceeds available excess multiplex capacity, then the excess multiplex capacity is allocated according to a statutorily – prescribed auction process.

The JVCs submitted that it is not open to the JVC to arbitrarily allocate residual excess capacity to an access seeker without following the process stipulated in the Radiocommunications Act. Section 118NT(3) makes it clear that if the JVC exercises the option to subsequently ascertain demand for any residual excess capacity, then it must give notice to all and comply with the applicable allocation process in the remainder of s. 118NT. Any such allocations would also remain subject to the capacity cap restrictions under s. 118NV which prohibit each incumbent commercial broadcaster from holding more than two-

³⁰ CBAA, *Submission for assessment of access undertaking for digital radio multiplex transmission services in Canberra, Darwin and Hobart*, December 2018, p. 6

ninths of the total amount of capacity per multiplex. Accordingly, the JVC cannot arbitrarily allocate such residual excess capacity.

The JVCs also submitted that it will have strong incentives to maximise the allocation and usage of any residual excess capacity. The submission described that to the extent that residual excess capacity exists because it is not allocated as part of the initial process under s. 118NT(2), then the JVC will always have an incentive to subsequently allocate that residual excess capacity if there is interest. This is because a failure to allocate that capacity would result in each access seeker (including each JVC owner) facing a higher access charge relative to a situation where that residual excess capacity is acquired by an interested party. Allocation of that residual excess capacity would spread the JVC's costs across a larger number of access seekers for recovery, resulting in per unit, fee reduction for each one-ninth of multiplex capacity. Consequently, the pricing principles, when combined with the protections offered by the capacity cap to prevent capacity misuse and hoarding, create the correct incentives and would avoid the scenarios suggested by the CBAA.

Table 2 presents the initial indicative fractions of multiplex capacity the broadcasters in each market are expected to take up as standard access entitlements and expected levels of excess capacity.

Table 2 Initial multiplex capacity allocation

Canberra	
Commercial Broadcasters	4/9
Community Broadcasters (reserved)	2/9
Unallocated (initial excess capacity)	3/9
Darwin	
Commercial Broadcasters	2/9
Community Broadcasters (reserved)	2/9
Unallocated (initial excess capacity)	5/9
Hobart	
Commercial Broadcasters	3/9
Community Broadcasters (reserved)	2/9
Unallocated (initial excess capacity)	4/9

Source: JVC's submission to the ACCC, February 2019

ACCC assessment:

The ACCC acknowledges the CBAA's concerns and considers that, although there is provision in the Act for the allocation of excess capacity by grant or auction, the conditions for ascertaining the level of demand for residual excess capacity after 12 months is not mandatory.³¹

³¹ For example: Section 118NT(6) provides that if the demand from interested content service providers for access to the excess multiplex capacity is greater than the excess multiplex capacity, the digital radio multiplex transmitter licensee must:

The ACCC considers the JVC Annual Report required under s. 118PN facilitates monitoring of any excess-capacity access entitlement allocation and corresponding compliance obligations under s. 118NT. Sections 118PN(2)(b)(ii) and (iii) provide for reporting on compliance of standard access entitlements and excess-capacity access entitlements, respectively. In each annual report, there is an indication in the variation of these access allocations including compliance with non-discrimination obligations under s. 118NP and clause 7.3 in the proposed access agreement.

In the metro broadcasting areas, these annual reports have to date provided information about access entitlement availability and any subsequent allocations occurring in the financial year. This has helped alleviate concerns regarding arbitrary excess capacity allocations. In metro areas an auction for excess capacity took place in 2009-10 according to the JVCs' annual report for metro areas.³² The reports indicate excess-capacity access entitlements were made available each year to content service providers but none further were allocated after 2009-10.

Residual excess capacity can exist after the initial assessment of demand and consequent grant or auction.³³ If the initial ascertained level of demand is less than the available excess capacity, then the access entitlements will be allocated and there will be residual excess capacity. If the initial ascertained level of demand is greater than the available excess capacity, the auction process does not necessarily allocate all the excess capacity; thus resulting in residual excess capacity. Using Brisbane as an example, although the level of demand was higher than the available excess capacity, 128 kbps of the excess capacity failed to be sold at auction.³⁴ It is in the interest of the DRMT Licensee to ascertain the level of demand to utilise this excess capacity after 12 months.

The ACCC considers that it would be beneficial for all parties if the JVCs determine demand for the residual excess capacity after the initial 12 month period more frequently. However, the ACCC also considers that there is an incentive for JVCs to ascertain the level of demand for excess capacity after the initial 12 months, because that way any residual capacity can be sold or auctioned which will maximise profits.³⁵ This incentive is discussed further in chapter 4.5. Also, even if the JVCs do not ascertain demand after the 12 month period, pursuant to 118NT of the Act, it is not possible to randomly allocate the residual excess capacity to anyone – the only way excess capacity can be allocated is first by determining the level of demand.

The ACCC considers that “may” is the appropriate word to use in s. 118NT(3) of the Act rather than “must”, because there may not be any residual excess capacity to allocate after the initial allocation, which is mandatory for the JVCs to be completed within 90 days from the start-up date. The ACCC does not consider that rewriting the legislation in the undertaking is necessary for this matter.

(a) use an open and transparent auction process to determine which content service providers are to have access to which fraction of multiplex capacity for the purpose of providing one or more content services in the designated BSA radio area; and

(b) do so before the end of the 60-day period beginning on the day on which the demand from interested content service providers is ascertained.

³² JVC, *Digital radio annual report 2009–10*, 24 December 2010, www.accc.gov.au/regulated-infrastructure/communications/broadcasting-content/digital-radio-services/annual-reports

³³ A digital radio multiplex transmitter licensee must ascertain the initial level of demand for excess-capacity access entitlements within 90 days of the digital radio start-up date under s. 118NT(2)(a) of the Act. Further, excess capacity could arise if content providers and relevant parties terminate their access entitlements.

³⁴ JVC, *Digital radio annual report 2009–10*, 24 December 2010, p. 18

³⁵ Allocating the excess-capacity access entitlements results in lower access fees for each access seeker. A successful auction leads to higher profit for the licensee.

The ACCC is not aware of any record of complaint from the access seekers in the metro areas in relation to this matter. The allocation process s. 118NT in the Act (referred to in clause 5.3 of the access agreement) does not unduly restrict competition in the allocation of residual excess-capacity entitlements. The ACCC considers that this matter can be addressed in the operational manual and if this matter still causes any concern for the access seekers in the future, a dispute resolution mechanism is in place to resolve this.

4.3. Reasonable terms and conditions of access

The ACCC's preliminary assessment was that the terms and conditions specified in the proposed access undertaking are reasonable.

This preliminary position was based on considering the facts such as:

- clause 2.2 of the proposed access agreement states that the DRMT Licensee will develop an operational manual in consultation with all access seekers, if requested by an access seeker, to deal with technical and operational matters that arise under or in connection with the proposed access agreement, or the supply of the multiplex transmission service
- clause 7.6 of the proposed access agreement provides that each party is responsible for the safe operation of the systems, equipment and facilities used by that party in connection with the multiplex transmission service. Both parties – the DRMT Licensee and access seeker – must take all reasonable steps to ensure that the systems, equipment and facilities used by them in connection with the multiplex transmission service do not:
 - endanger the health or safety of any person
 - damage, threaten, interfere with, degrade or result in the deterioration of the operation or performance of the systems, equipment or facilities
- clause 14 of the proposed access agreement provides that a party may terminate the access agreement by giving the other party 30 days written notice of its intention to do so. Upon termination, the DRMT Licensee must refund any amount pre-paid by the access seeker and/or the access seeker must pay all sums payable to DRMT Licensee under the access agreement up to the date of termination
- the terms and conditions in the proposed undertaking in relation to access are similar to those accepted by the ACCC in the 2013 varied access undertakings, which have been considered to be running effectively.

Stakeholder views and concerns

CRA submitted that the price and non-price terms and conditions in the proposed undertaking are reasonable.

The CBAA submitted that potential interoperability concerns may arise if the licensees introduce technology or standards that the CBAA is unable to acquire or believes is not appropriate for the CBAA's operations.

The CBAA submitted that the undertaking can be improved with the addition of a commitment to conduct bi-annual meetings to discuss and report on operational, performance and development issues. It advised that a mandatory/formal consultation mechanism would facilitate ongoing discussion and cooperation between stakeholders about such matters as changes to the equipment required, upgrades, updates or any material change to the architecture or infrastructure used.

The JVCs submitted that while there is broad support for consultation, the JVCs do not consider that these additional commitments need to be included within the access undertaking. According to the JVCs, the existing mechanisms within the access undertaking, along with the broader arrangements that apply at the industry level in respect of operational and technical matters, already facilitate significant levels of consultation between industry stakeholders on these issues. In support of the statement, the JVCs provided that:

- the JVCs have a broad obligation in the access undertaking not to discriminate between access seekers in technical and operational matters, nor to hinder access to the multiplex transmission service
- there already exists a multi-party industry forum convened by Commercial Radio Australia, the Digital Technical Advisory Committee (DTAC) that meets six times a year to discuss operational, technical and development matters. DTAC includes representatives of the various stakeholders (including the CBAA) and technical subject matter experts. The operational and technical aspects of the multiplex transmission service are already within the scope of DTAC's functions. The JVCs consider that DTAC is the appropriate forum to address any potential issues and there is likely to be little gained, if anything, from implementing additional bilateral consultation obligations in the access undertaking
- the JVCs have designed the multiplex transmission service in a way that aligns to global standards for DAB+ transmission, and do not anticipate that there will be any interoperability issues associated with its design
- the JVCs are using leading vendors for the DAB+ transmission equipment and its vendor and equipment selection decisions have been shared with the CBAA. Such decisions have had regard to the need to ensure compatibility to the extent possible with existing systems
- the access undertaking includes an option to develop an operations manual, and this can serve as the basis for clarifying and providing further details on operational and technical matters for the benefit of access seekers, if required.

ACCC assessment:

The submission by the CBAA was the first instance the ACCC had been made aware of any potential issues with interoperability. There were no apparent issues in any of the metro areas since the introduction of digital radio in 2009, or in any preliminary discussions with stakeholders in relation to the access agreements in Canberra, Hobart and Darwin.

In discussions with the ACCC, the CBAA confirmed that there is a Digital Technical Advisory Committee (DTAC) in place which operates regularly for metro areas. In the ACCC's consultation with the CBAA, the CBAA agreed that the DTAC or similar forums could address regional area matters and would align with the spirit of the consultation process outlined in the CBAA's submission. However, the CBAA submitted that the undertaking should in itself provide high level guidance in relation to the proposed bi-annual meetings, mostly to address equipment and interoperability matters.

Furthermore, the Digital Radio Planning Committee (DRPC) for regional Australia, which is chaired by the ACMA is another forum for discussion between the access seekers and providers, considering all are members. While as noted by the CBAA, this issue has not been discussed at the forums it would appear likely that it will incorporate this issue onto its agenda.

The ACCC encourages consultation between the parties using the existing forums and any further mechanism included in the operations manual, should the community broadcasters decide to request one.

There is also a technical subcommittee, of the DRPC with the CBAA being one of its members as mentioned earlier in this paper.

As previously mentioned, s. 44A(1)(e) of the Act requires the ACMA to prepare a digital radio channel plan which determines technical specifications of multiplex transmitters operated under DRMT licences for the designated BSA area. Also s. 130AB of the *Broadcasting Services Act 1992* provides that the ACMA may, by legislative instrument, determine technical standards that relate to the operation of multiplex transmitters under digital radio multiplex transmitter licences.

There is also a possible option to consider the use of an operational manual which deals with technical and operational matters that arise in connection with the access agreement or the supply of the DRMT service. Pursuant to clause 2.2(b) of the access agreement, a DRMT Licensee must:

- i. develop the Operational Manual if requested by an Access Seeker;
- ii. undertake consultation with all Access Seekers in good faith in respect to any such Operational Manual;
- iii. use its reasonable endeavours to accommodate any reasonable requests that may be made by an Access Seeker during the consultation process in respect of the development or contents of the Operational Manual; and
- iv. ensure that the Operational Manual is consistent with the access agreement.

Clause 2.2(d)(ii) of the access agreement states that the operational manual may be amended by the DRMT Licensee from time to time subject to terms and conditions including consulting with the access seekers in good faith and use reasonable endeavours to accommodate any reasonable request that may be made by an access seeker.

The ACCC does not consider that there is a requirement to amend the terms and conditions in the proposed undertaking. We consider that DTAC or a similar forum can address the CBAA's concerns and we encourage this consultation. The CBAA also will have an option to consult with the JVCs on an operational manual if required. The access seekers are also able to resort to the dispute resolution mechanism (DRM) if the issues cannot be resolved through DTAC or the operational manual. Also, the ACCC has the discretion to require DRMT Licensees to vary an undertaking in accordance with s. 118NH(2)(b) of the Act.

4.4. Fair and reasonable pricing methodology

The ACCC's preliminary assessment was that the pricing methodology in the proposed access undertaking is fair and reasonable.

The ACCC reached this position based on consideration of facts such as:

- schedule 2 in the proposed access agreement sets out the pricing principles applicable to the provision of the multiplex transmission service by the DRMT Licensee and the methodology for determining the standard charges payable by access seekers to the DRMT Licensee for the multiplex transmission service
- clause 3.1 of schedule 2 in the proposed access agreement provides that as a general over-arching principle, a DRMT Licensee may supply the multiplex transmission service at a price that allows the DRMT Licensee to:
 - recover no more than its efficient costs and
 - earn a normal commercial rate of return on its investment

- s. 4 of schedule 2 in the proposed access agreement provides that fixed recurring charges will be levied based on the multiplex capacity allocated to an access seeker, irrespective of whether that capacity is used or not and irrespective of the type of use
- s. 5 of schedule 2 in the proposed access agreement provides that as at the effective date, the DRMT Licensee will provide the access seeker with a price list setting out the fixed recurring charges that are applicable in respect of multiplex capacity allocated to the access seeker and if applicable, the period for which the fixed recurring charges are valid.³⁶ Clause 5.2(a) of the schedule states that the DRMT Licensee may review the fixed recurring charges payable by access seekers who acquire the multiplex transmission service to ensure consistency with the pricing principles
- clause 3.4(c)(iii) of schedule 2 in the proposed access agreement provides that the DRMT Licensee will review the weighted average cost of capital (WACC) on an annual basis
- the terms and conditions in the proposed undertaking in relation to access prices and pricing methodologies are similar to those accepted by the ACCC in the 2013 varied access undertaking.

Stakeholder views and concerns

CRA submitted that the pricing methodologies in the undertakings are fair and reasonable. CRA stated that the proposed undertaking provides cost-oriented pricing with a reasonable rate of return. Also, the pricing principles provide for extensive consultation with access seekers.

The CBAA queried changes in the pricing methodology in relation to the WACC calculations. Schedule 2, clause 3.4(c)(v) in the proposed access agreement provides that “the Multiplex Licensee will determine the weighted average cost of capital by having regard to the most up-to-date final regulatory decision or determination issued by the ACCC or AER in respect of the telecommunications, electricity or gas industries in Australia...”. The CBAA’s query was “whether an annual review of the WACC is actually necessary”? The CBAA supported the change “subject to further text to indicate that the review parameters include that the WACC adopted remain at the low end of any referenced determination”.³⁷

The JVCs submitted a proposed annual review of the WACC using the latest ACCC decision from comparable regulated sectors to ensure that the return on capital component of the access charges reflects the latest ACCC-endorsed approaches.

The JVCs also submitted that the additional wordings suggested by the CBAA to ensure that any adopted WACC figure is at the low end of any reference determination is not required. This is because the WACC determined in respect of another regulated sector will not typically be expressed as a range but as a definitive figure, based on specific WACC parameters.

ACCC assessment:

The ACCC considers that it is appropriate to review the WACC figures annually and consistently. This is because even if the effect of not updating WACC in a particular year might not be material, it is important to also consider that the effect of not updating WACC for a number of years might ‘add up’.

³⁶ Effective date is defined in the proposed access agreement as the date that the access agreement is executed by both parties.

³⁷ CBAA, *Submission for assessment of digital radio undertaking*, December 2018, p. 12

As the stakeholders did not raise any other issue in relation to the pricing methodology, and as the pricing methodology is similar to the methodology in place for metro areas which seem to be working effectively, the ACCC considers that the pricing methodology in the proposed access undertaking is fair and reasonable.

4.5. The proposed undertaking should not hinder access

The ACCC's preliminary assessment was that the proposed undertaking meets the criteria to fulfil an obligation of the DRMT licensees to not hinder access.

This assessment was based on considerations such as:

- clause 7.2 of the proposed access agreement provides that the DRMT Licensee must not prevent an access seeker from obtaining access to the multiplex transmission service in accordance with the applicable terms of the access agreement.
- the terms and conditions in the proposed undertaking in relation to the obligation on the DRMT Licensee to not hinder access are similar to those accepted by the ACCC in the 2013 varied access undertaking.

The CBAA submitted that the undertakings can be improved with the addition of a commitment to:

- efficient use of spectrum by operation of radiofrequency service as near as practical to the maximum specified in the relevant ACMA licence
- interoperability, and an inclusive methodology for operational and developmental matter
- a trigger included in the access undertaking that commits the DRMT Licensee to undertake a process that leads to allocation of excess capacity by grant or auction.

Sections 4.2 and 4.3 of this decision paper discuss the ACCC's response to the CBAA's concerns. All other submissions agreed with the ACCC's preliminary position. CRA stated that the proposed undertaking prohibits the multiplex licensee from hindering an access seeker's access.

The DRMT Licensees have an incentive to make excess-capacity entitlements available to eligible access seekers and interested content service providers. This is because of how the licensee's costs are recovered. The licensee has a level of costs that are recovered from the access seekers. When there are more access seekers, the costs are spread over each of the access seekers resulting in a lower per unit cost for the access seeker.³⁸ JVCs that are also access seekers benefit from the lower costs. Lower costs for the access seekers could attract more content service providers, increasing the demand for any excess-capacity entitlements and further lowering the access charges. This gives rise to two beneficial scenarios depending on the level of demand for the excess-capacity entitlements.

The first scenario is that the ascertained level of demand is below the available excess capacity. In this case, the JVCs benefit from reduced access charges as explained above. The second scenario occurs if the demand exceeds the excess capacity whereby the excess-capacity entitlements are allocated via an auction which has the potential to generate revenue for the licensee.³⁹ Hence, in both scenarios, there is an incentive for the licensee to avoid hindering access to access seekers.

Therefore the ACCC considers that the proposed undertaking has sufficient provisions to ensure that the DRMT Licensees do not hinder access to access seekers.

³⁸ JVC, *JVC supplementary submission - responses to CBAA submissions*, February 2019, p. 6

³⁹ Under s. 109C(2)(b) of the Radiocommunications Act, the licensee receives the proceeds of the auction

4.6. Reasonable dispute resolution mechanism

The ACCC's preliminary assessment was that the proposed undertaking includes a reasonable dispute resolution mechanism (DRM).

The ACCC's assessment considered that clause 20 of the proposed access agreement provides that all disputes arising in relation to the access agreement are to be resolved in accordance with the DRM.⁴⁰

The DRM sets out the terms and conditions in case of a dispute and provides that if the dispute cannot be resolved even after it has been considered at the CEO level, after 10 business days, either party may refer the dispute to mediation.

If the parties cannot agree on the selection of a mediator within 5 business days, either party may apply to the president of the Australian Commercial Disputes Centre (ACDC) requesting the appointment of an independent mediator. The settlement reached through mediation is final and binding on the parties.

All submissions received on the consultation and position paper agreed that the proposed undertaking provides for a reasonable dispute resolution mechanism.

The ACCC's position is unchanged from its preliminary that the undertaking provides for a reasonable dispute resolution mechanism.

4.7. Other matters that the ACCC may consider

The ACCC's consultation and position paper requested stakeholders to submit, in addition to the six matters listed in the Decision-making criteria, any other matters which the ACCC may consider in relation to the assessment of the proposed undertaking.⁴¹

Stakeholder views and concerns

The CBAA submitted that subject to improvements outlined in the submission, the CBAA supports the proposed access undertaking. All other submissions also supported the ACCC's initial assessment and position to accept the proposed access undertaking in its current form.

The CBAA raised concern that the term "Representative Company" has been removed from clause 4.4(e).

ACCC assessment

Clause 4.4(e) in the proposed access agreement provides that nothing prevents a Digital Community Broadcaster from granting a third party the right to:

- (i) provide outsourced transmission services on behalf of that Digital Community Broadcaster in the Designated BSA Radio Area; or
- (ii) manage the digital spectrum on behalf of that Digital Community Broadcaster in the Designated BSA Radio Area.

⁴⁰ Except billing disputes which are to be resolved in accordance with clause 11 of the Access Agreement

⁴¹ [Digital Radio Multiplex Transmitter Licenses \(Decision-Making Criteria\) Determination 2018](#)

In contrast, clause 6.4(e) in the 2013 access agreement provided that nothing prevents a Representative Company or a Digital Community Broadcaster from granting a third party the right to:

- (i) provide outsourced transmission services on behalf of a Digital Community Broadcaster in the Designated BSA Radio Area; or
- (ii) manage the digital spectrum on behalf of a Digital Community Broadcaster in the Designated BSA Radio Area.

The CBAA's concern is that the term "Representative Company" is not included in the proposed agreement in clause 4.4(e). The CBAA submitted that the terminology used did not accurately match the current arrangements of the community digital radio broadcasters and the licensees, and did not reflect the coordination arrangements for shared capacity.

In the proposed access agreements, the definition of an "Access Seeker"⁴² may include:

- an incumbent Commercial Broadcaster; and
- a Digital Community Broadcaster

This definition does not include a representative company.⁴³ Since a Representative Company is not an access seeker, the standard access entitlements are not made available to the Representative Company pursuant to Division 4B of Part 3.3 of the Act.⁴⁴ These entitlements are only available to the commercial and community broadcasters.

Specifically, clause 4.4 refers to the allocation of standard access entitlements for Digital Community Broadcasters. Consequently, under clause 4.4(e), granting the third party rights to provide outsourced transmission services or manage digital spectrum is only applicable to the access seeker (in this case the Digital Community Broadcaster) and not the representative company. Accordingly, the removal of the Representative Company from clause 4.4(e) is appropriate.

For the reasons set out above, the ACCC considers that clause 4.4(e) as drafted in the proposed access agreement is appropriate.

Other matters considered

The CBAA agreed to changes made in clause 5.3 and 5.4 in the proposed access agreement subject to replacement of the words "incumbent Commercial Broadcaster" with "digital broadcaster" in clauses 5.3(i) and (ii). The CBAA also submitted that clause 5.4 in the proposed access agreement should be deleted, stating that this will avoid the need for subsequent revision should Standard Entitlements and caps be changed in the Act.

The ACCC considers that the term "digital broadcaster" is already in place in the two clauses referred to by the CBAA. Clauses 5.3 (b) and (c) of the proposed access agreement states:

"(b) A Digital Broadcaster that acquires an Excess-Capacity Access Entitlement pursuant to this clause:

- (i) may only use the Excess-Capacity Access Entitlement to provide Content Services in the designated BSA Radio Area; and

⁴² Schedule 1 of the proposed access agreements for Canberra, Darwin and Hobart

⁴³ This is one of the changes in the proposed agreements from the access agreements in the metro areas. The CBAA agreed to this change.

⁴⁴ Representative Companies are not the recipient of the standard access entitlements but have the role of nominating the amount of standard access entitlements that will be allocated to community broadcasters under s. 118NR of the Act.

(ii) is not restricted from transferring that Excess-Capacity Access Entitlement, provided the transfer is to another Digital Broadcaster that is permitted to hold that Excess-Capacity Access Entitlement.

(c) Nothing prevents a Digital Broadcaster from granting a third party the right to:

(i) provide outsourced transmission services on behalf of that Digital Broadcaster in the Designated BSA Radio Area; or

(ii) manage the digital spectrum on behalf of that Digital Broadcaster in the Designated BSA Radio Area.”

The ACCC also considers that it does not seem reasonable to amend the proposed undertaking on the basis that the Act may be revised at a later point in time. If the undertaking becomes inconsistent with the Act due to any revision, the ACCC will seek to vary the undertaking.

The CBAA did not agree with clause 7.4(b) in the proposed access agreement and submitted that a “representative company” should be defined as “digital community radio broadcasting representative company” in the proposed access agreement.

The ACCC does not consider that the proposed access agreement need to be edited because Schedule 1 of the proposed access agreement defines representative company as “the Digital Community Radio Broadcasting Representative Company.”

5. Final decision on the digital radio access undertakings

As a result of the assessment in chapter 4, the ACCC’s final decision is to accept the proposed access undertaking pursuant to s. 118NF of the Act.